Supreme Court, U.S.
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NO. 93-1608

In The Supreme Court of the United States

OCTOBER TERM, 1993

W.S. McBEATH, *as Administrator of the Texas Alcoholic Beverage Commission,*

Petitioner,

vs.

STEVE C. COOPER, *et al.,*

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a state statute which requires a person to reside in the state for three years before being deemed qualified to own a majority of the shares of a domestic corporation with an alcoholic beverage permit violates the Commerce Clause, Art. I, § 8, cl. 3 of the United States Constitution.

2. Whether a state statute which requires a person to reside in the state for three years before being deemed qualified to own a majority of the shares of stock of a domestic corporation with an alcoholic beverage permit is authorized by § 2 of the Twenty-first Amendment to the United States Constitution, notwithstanding that it violates the Commerce Clause of the United States Constitution.

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The judgment of the Court of Appeals is correct. There is neither conflict with any applicable decision of this Court nor any decision of another court of appeals. Further, the modification by the Texas legislature of the statutes struck down makes

this case so unique that it does not warrant further judicial review. Finally, the laws in only two states would be affected by a decision of this Court, so the case lacks sufficient national importance to warrant further judicial review.

I. THE DECISIONS BELOW ARE NOT IN CONFLICT WITH ANY PRIOR DECISIONS OF ANOTHER UNITED STATES COURT OF APPEALS, OR WITH ANY APPLICABLE DECISIONS OF THIS COURT

The trial court held that a Texas statute which requires a residency of at least three years' duration before one may own the majority of stock in a Texas corporation with a liquor permit was unconstitutional. The court found that the statute discriminated against non-Texans who wished to engage in the occupation of retail liquor sales in Texas, in violation of the Commerce Clause. And relying on this Court's decision in *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274 (1984) the district court also found the statute in violation of the Privileges and Immunities Clause. The court further held that the statute was not protected by the Twenty-first Amendment, relying on this Court's decision in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984).

The Fifth Circuit upheld the district court's ruling that the statute violated the Commerce Clause, and was not otherwise valid under the Twenty-first Amendment. The court did not address the challenge brought under the Privileges and Immunities Clause.[1]

[1]Petitioner argues the Privileges and Immunities issue in his Petition. Because that question was never considered by the Court of Appeals, Respondents have not presented argument on the question in this Brief.

The questions decided by the District Court and the Court of Appeals have never before been decided by this Court or by any other court of appeals. Petitioner makes a broad, generalized statement that conflict exists:

> The opinions and judgments of the federal district court and the Court of Appeals for the Fifth Circuit are unprecedented, and are in conflict with over fifty-eight years of this Court's precedent concerning the relationship between the Twenty-first Amendment and the dormant Commerce Clause and in conflict with over one hundred years of this Court's precedent concerning a state's police powers to regulate the sale of liquor within its borders.
>
> Petitioner's Brief, at 6.

The decisions may be considered to be unprecedented, since neither this Court nor any court of appeals has ever ruled on the specific questions decided below. But the decisions of the courts below are by no means in conflict with applicable decisions of this court.

II. THE DECISION OF THE COURT OF APPEALS IS NOT OF SUFFICIENT NATIONAL IMPORTANCE SO AS TO WARRANT FURTHER REVIEW BY THIS COURT.

A. Modification of the challenged statutes by the Texas legislature makes this case so unique that further review is unnecessary.

Following the decision of the trial court, and while this case was pending in the Court of Appeals, the Texas legislature eliminated the residency requirement for shareholders of Texas corporations with liquor permits. The new Texas statute now in effect includes the following provision applicable to shareholders:

> Sec. 6.03. CITIZENSHIP REQUIREMENTS. (a) It is the public policy of this state and a purpose of this section to require that, except as provided in Subsection (k) of this section or otherwise in this code, a permit or license may not be issued to a person who was not a citizen of this state for a one-year period preceding the date of the filing of the person's application for a license or permit . . .
>
> (k) A requirement under this code that 51 percent or more of the stock of a corporation be owned by a person or persons who were citizens of this state for a one-year period preceding the date of the filing of an application for a license or permit does not apply to a corporation organized under the laws of the state that applies for a license or permit under Chapters 25-34, Chapter 44, Chapters 48-51, Chapters 69-72, or Chapter 74 of this code if:
>
> (1) all of the officers and a majority of directors of the applicant corporation have resided within the state for a one-year period preceding the date of the application and each officer or director posseses the qualifications required of other applicants for permits and licenses;

(2) the applicant corporation and the applicant's shareholders have no direct or indirect ownership or other prohibited relationship with others engaged in the alcoholic beverage industry at different levels as provided by Chapter 102 of this code and other provisios of this code;

(3) the applicant corporation is not precluded by law, rule, charter, or corporate bylaw from disclosing the applicant's shareholders to the commission; and

(4) the applicant corporation maintains its books and records relating to its alcoholic beverage operations in the state at its registered office or at a location in the state approved in writing by the commission.

Thus, under the Texas Alcoholic Beverage Code as it now reads, a non-Texan may own one hundred percent of a Texas corporation with a mixed beverage permit. The residency requirement which barred Respondents from acquiring the majority ownership of K.S. Enterprises, Inc. has been eliminated.

Respondents believe that the residency requirements of the new statute are unconstitutional. But those requirements are not before this Court in this case. Because of the action of the legislature, there would be no judicial purpose served by a review of the decision of the Court of Appeals.

B. There are so few states with corporate shareholder residency requirements that this case lacks significant national importance.

No issue of national importance is raised by the Petition. Petitioner claims that "eighteen [states] impose a residency requirement on the licensee, thereby excluding out-of-state residents from holding a license to sell intoxicating liquors." Petition, at 7. Petitioner then includes a lengthy string citation which lists the seventeen states in addition to Texas which impose those residency requirements. Petition, at 7-8, fn. 7. A close examination of those statutes, however, tells a different story.

First, it must be remembered that Respondents did not raise a challenge to all of Texas' residency requirements. Respondents challenged those provisions of the Texas Alcoholic Beverage Code which prohibited non-Texans from owning majority interest in a Texas corporation with a mixed beverage permit. Regardless of statutes in other states which may impose residency requirements on officers, directors or managers, or natural persons with licenses (as opposed to corporations), it is the prohibition against non-resident shareholders which is at issue here.

ALASKA: There is no residency requirement for shareholders of domestic corporations holding liquor licenses. In fact, licenses may be issued to foreign corporations, and non-residents may purchase the stock of domestic corporations which have been incorporated for at least one year. ALASKA STAT. § 04.11.390(b) provides:

> A beverage dispensary license or package store license may not be issued to either a domestic corporation that has not been issued a certificate of incorporation or a foreign corporation that has not been issued a

certificate of authority to transact business in the state at least one year before the date of the application. However, a beverage dispensary or package store license may be issued to a domestic corporation if each of the stockholders of the corporation has resided in the state for at least one year immediately preceding the filing of the application.

ARIZONA: There is no residency requirement for shareholders. The applicable statute is ARIZ. REV. STAT. ANN. § 4-202(A) (1956 & Supp. 1993):

> Every spirituous liquor licensee, other than a club licensee, a corporation or an out-of-state distillers, shall be a resident of this state . . . a corporate general partner is required to meet the requirements of a corporate licensee . . . . If a corporation, it shall be a domestic corporation or a foreign corporation which has qualified to do business in this state and shall hold its license through an agent.

ARKANSAS: There is no residency requirement for shareholders. According to ARK. STAT. ANN. § 3-9-305(a)(6) (1987 & Supp. 1993):

> (a)(6): If the applicant is a corporation, all officers and directors thereof, any stockholders owning more than 5% of stock, and persons who shall conduct and manage shall possess qualifications of individual licensees. The requirements as to residence shall not apply to officers, directors, and stockholders of the corporation, but the requirement shall apply to any officer, director, or stockholder who is also the

> manager of the licensed premises, in any capacity in the conducting or operation of the licensed premises.

Prior to 1991 the state imposed a two-year residency. However, that requirement was eliminated because the legislature found it cumbersome and an interference to commerce. The legislature also noted that "national corporations are hindered in their operations in that they cannot have newly transferred managers or other key employees assume positions of responsibility within their local outlets since those persons do not meet the 2 year residency requirement and that such requirement pose an unreasonable burden on the conduct of business in this state as it relates to alcohol."

GEORGIA: There is a requirement that a corporation exist for one year before obtaining a liquor license, but no mention of any residency requirement for shareholders. GA. CODE ANN. §§ 3-4-23 and 3-5-40 (1990 & Supp. 1993) provide:

> (a) No retail dealer's license or tax stamps for distilled spirits shall be sold to any person unless an application is filed with the commissioner, accompanied by a certificate by the judge of the probate court of the county of the applicant's residence certifying that the applicant has been a bona fide resident of the county or municipality for at least 12 months immediately preceding the application and is a resident of the county or municipality where distilled spirits may be legally sold under this chapter.

§ 3-1-2 (16) defines "person" to include a corporation.

INDIANA: This is the most stringent residency requirement in the country. According to IND. CODE ANN. § 7.1-3-21-3 and 7.1-3-21-5 (Burns 1993):

> Residency requirements. The commission shall not issue an alcoholic beverage wholesaler's, retailer's, or dealer's permit of any type to a person who has not been a continuous and bona fide resident of this state for five (5) years immediately preceding the date of the application for a permit.
>
> Corporations. The commission shall not issue an alcoholic beverage wholesaler's, retailer's, or dealer's permit of any type to a corporation unless sixty percent (60%) of the outstanding common stock is owned by persons who have been continuous and bona fide residents of this state for five (5) years, and at least one (1) of the stockholders shall have been a resident, for at least one (1) year immediately prior to making application for the permit, of the county in which the licensed premises are to be situated. Each officer and stockholder of a corporation shall possess all other qualifications required of an individual applicant for that particular type of permit.

KANSAS: Other than Indiana, this is the only other state with a residency requirement. Pursuant to KAN. STAT. ANN. § 41-311 (1993):

> (b) No retailer's license shall be issued to:
> (1) a person who is not a resident of this state;
> (2) a person who has not been a resident of this

state for at least four years immediately preceding the date of application;

(6) a corporation;

KENTUCKY: Under Kentucky law there is no bar to non-residents owning shares of a corporation with a liquor license. Under KY. REV. STAT. ANN. § 243.100 (Baldwin 1993):

> No person shall become a licensee under KRS 243.020 to 243.670 who:
>
> (3) Is not a citizen of the United States and has not had an actual bona fide residence in this state for at least one (1) year before the date on which his application for a license is made. This section shall not apply . . . to applicants that are corporations authorized to do business in this state or to persons licensed on March 7, 1938;
>
> (4) Is a partnership or corporation, unless each member of the partnership or each of the directors, principal officers, or managers of the corporation has not been convicted of any misdemeanor or felony directly attributable to the use of alcoholic beverages, is twenty-one (21) years of age or more and is a citizen of the United States . . . .

LOUISIANA: There is no residency requirement for shareholders. The following provision in LA. REV. STAT. ANN. § 26.80 (West 1989 & Supp. 1994) applies to shareholders of Louisiana corporations holding retail liquor licenses:

> . . . The requirements as to citizenship and residence do not apply to officers, directors and stockholders of corporations applying only for retail permits. The corporation shall either be organized under the laws of the state of Louisiana or qualified to do business within the state of Louisiana.

MARYLAND: There is a two-year residency requirement in Maryland for the resident applicant for a corporate liquor license, but no residency requirement for shareholders of a corporation. According to MD. CODE ANN., Alco.Bev. § 7 (1957 and Supp. I 1993):

> § 7. Applicants.
>
> (a) Residence qualifications.--An individual applicant, an applicant qualifying as a resident applicant for a corporation or each applicant for a partnership applying for manufacturer's or wholesaler's license shall have been for two years next preceding the filing of the application a resident of the State of Maryland.

MASSACHUSETTS: There is no residency requirement for corporate shareholders. Pursuant to MASS. GEN. LAWS. ANN. ch. 138, § 26 (West 1991 & Supp. 1994):

> No corporation, organized under the laws of the Commonwealth or of any other state or foreign country, shall be given a license to sell in any manner any alcoholic beverages unless such corporation shall have first appointed, in such manner as the licensing authorities by regulation prescribe, as manager or other principal representative, a citizen of the United States, and shall

> have vested in him by properly authorized and executed written delegation as full authority and control of the premises, described in the license of such corporation, and of the conduct of all business therein relative to alcoholic beverages as the licensee itself could in any way have and exercise if it were a natural person resident in the Commonwealth, nor unless such manager or representative is, with respect to his character, satisfactory to the licensing authorities.

MISSOURI: There is no residency requirement for shareholders. Under the Liquor Control Law of the State of Missouri, non-residents may own all of the shares of a Missouri corporation with a retail liquor license. MO. ANN. STAT. § 311.060(1) has only one provision establishing a residency requirement on a domestic corporation holding a retail liquor license:

> . . . nor shall any corporation be granted a license hereunder unless the managing officer of such corporation is of good moral character and a qualified legal voter and taxpaying citizen of the county, town, city or village . . . .

NEBRASKA: Although Nebraska has a requirement that license holders be residents of the county in which the licenses premises are located, the law -- NEB. REV. STAT. § 53-125 et. seq. (1943 & Supp. 1993) -- exempts corporate shareholders:

> § 53-125. Classes of persons to whom no license issued. No license of any kind shall be issued to (1) a person who is not a resident of the county in which the premises covered by the license are located, except in

case of railroad, airline, or boat licenses, (2) a person who is not of good character or reputation in the community in which he or she resides, (3) a person who is not a citizen of the United States, . . . (9) a corporation, if any officer, manager, or director thereof, or any stockholder, owning in the aggregate more than twenty-five percent of the stock of such corporation, would be ineligible to receive a license hereunder for any reason other than citizenship and residence within the governmental subdivision . . . .

NORTH DAKOTA: There is no residency requirement for shareholders. The relevant statute is N.D. CENT. CODE § 5-02-02 (1987 and Supp. 1993):

> § 5-02-02 Qualifications for license.
>
> No retail license may be issued to any person unless the applicant files a sworn application, accompanied by the required fee, showing the following:
>
> > . . . 2. If applicant is a corporation, the manager of the licensed premises and the officers, directors, and stockholders must be legal residents of the United States and of good moral character. Corporate applicants must first be properly registered with the secretary of state.

OKLAHOMA: There is no residency requirement of any kind to hold a mixed beverage license in Oklahoma. OKLA. STAT. title 37 (1991 & Supp. 1993)

RHODE ISLAND: R.I. GEN. LAWS § 3-5-10 (1956) provide that a liquor license may only be issued to a domestic

corporation. There is no residency requirement for shareholders of a corporation with a liquor license. A non-resident of Rhode Island may own one hundred percent of a Rhode Island corporation with a liquor license..

SOUTH CAROLINA: Under S.C. CODE ANN. § 61-3-420 (Law. Co-op. 1976 & Supp. 1993), corporations may hold liquor licenses, but the license must be in the name of an officer or agent of the corporation, and that individual must meet the following requirement:

> § 61-3-420 Persons ineligible for licenses.
>
> Unless the department in its discretion otherwise orders, no person is eligible for a license under this chapter, Chapter 7, and Article 3 of Chapter 13 if he or the person who will have actual control and management of the business proposed to be operated:
>
> > (2) is not a resident of the United States and has not been of South Carolina for at least thirty days before the date of the application and has maintained his principal place of abode in South Carolina for at least thirty days before the date.

WISCONSIN: Under WIS. STAT. ANN. § 125.04 (West 1989 and Supp. 1993), there are no residency requirements for shareholders of corporations with liquor licenses. § 125.04(5) imposes a residency requirement of ninety days on a natural person applying for a license. § 125.04(6) requires a corporation to have a natural person as the agent of the corporation, with authority to operate the business. That agent would have to meet the ninety-day residency requirement. Shareholders, regardless of the amount of stock they hold, are not required to be residents.

Only Indiana and Kansas have residency requirements for shareholders of corporations which hold liquor licenses. There is no reason to believe that if a case were brought in either of those states, the trial courts and courts of appeals would be unable to resolve the cases correctly. And Texas, the state from which this case arose, has eliminated its requirement. Therefore, this case lacks the requisite national importance to warrant review by this Court.

CONCLUSION

The decision of the Fifth Circuit is not in conflict with any decision of another Court of Appeals, nor with any applicable decisions of this Court. And because of the uniqueness of this case, and the fact that only two states have residency requirements, this case lacks the national importance which would justify review by this Court.

The Petition for Writ of Certiorari should be denied.

May 23, 1994

Respectfully submitted,

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